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No. 93-1617

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

THE VOLLRATH COMPANY,
Petitioner,
v.
SAMMI CORPORATION,
KEN CARTER INDUSTRIES, INC., and
SAMMISA (AMERICA) CORP.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

WELDON V. ZUFELT
BENSON, ZUFELT & DONOHUE
630 Riverfront Drive
Sheboygan, WI 53081
(414) 452-6373

MARIO L. HERMAN
5335 Wisconsin Ave., N.W.
Suite 440
Washington, D.C. 20015
(202) 686-2886

* Counsel of Record

WILLIAM P. TEDARDS, JR.
1101 30th Street, N.W.
Suite 500
Washington, D.C. 20007
(202) 625-4375

SAMUEL H. SEYMOUR *
1101 30th Street, N.W.
Suite 500
Washington, D.C. 20007
(202) 625-4300

Counsel for Petitioner

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PETITIONER'S REPLY MEMORANDUM

SUMMARY OF ARGUMENT

ON QUESTION NO. 1: *the legality of the Korean market division arrangement*

The opposing brief contradicts decades of antitrust jurisprudence by suggesting that a foreign market division arrangement, which awards an artificial monopoly to a single exporter and eliminates all competing products and prices available to United States customers, does not violate Section 1 of the Sherman Act *unless* the monopolist then decides to limit export quantities of its own product.

ON QUESTION NO. 2: *the court of appeals' refusal to decide the issue*

In arguing that the "gist" of the case was not presented in the district court, the opposing brief ignores the facts presented to the jury, the instructions given to the jury, and the facts as found by the district court for purposes of the JNOV.

ON THE LIMITED RELIEF OPTION: *remanding to the court of appeals with instruction to decide the market division issue*

The opposing brief does not contest the availability of this option, but simply states that the use of the procedure is "unwarranted" because remands are "generally" used for other purposes.

ARGUMENT

I. ON QUESTION NO. 1: *THE LEGALITY OF THE KOREAN MARKET DIVISION ARRANGEMENT*

A. The Korean Market Division Was "Inherently Suspect" And Should Have Been Condemned *Per Se* In The Absence Of Any "Plausible Efficiency Justification"

Market division arrangements are *designed* to eliminate "competition," which includes, among other things, customer choice among different products:

> "When we talk of the desirability of competition we ordinarily have in mind such things as low prices, innovation, *choice among differing products*—all things that we think of as being good for consumers." (emphasis added)

Robert Bork, *Antitrust Paradox* (1978), p. 61. Here, Sammi Corporation ("Sammi") was given the export market for stainless steel steamers under the Korean market division arrangement. It then used its monopoly power in that market to eliminate the Dae Lim steamer (which Vollrath was trying to order) and the Hai Dong steamer (which Metro was trying to order). United States customers were thus deprived of both "innovation" and "choice among differing products." And, according to the evi-

dence, United States customers were also deprived of lower prices. Vollrath had previously rejected Sammi as a supplier because its prices were high and its quality was low. (R.T. Vol. 6, p. 36, L.19-p. 37, L.18.)

An arrangement dividing markets in this way is "inherently suspect" and quickly condemned unless it has a "plausible efficiency justification," as Phillip Areeda puts it. (Petition, p. 18.) Or, as Robert Bork puts it, such an arrangement is *per se* illegal unless it is:

> ancillary to a contract integration; that is, the parties must be cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose. * * * Where there is no coordination of productive activities . . . such an agreement is naked rather than ancillary and should be illegal per se. Bork, *op cit.*, p. 279.

Sammi Offered A "Governmental" Defense But No Efficiency Justification

Sammi argued in the district court that it should be exempted from antitrust scrutiny because the exporters' association was a quasi-governmental organization established with Korean government approval, with Korean government officials participating, which gave Sammi "legitimate" rights. This argument (which is reflected in the district court's Memorandum of Decision, App. p. 23a, n.11 and p. 45a, n.34) does not amount to an economic efficiency justification. The fact that an agreed elimination of rivalry

> appears as a regulation of a cooperative group, such as an exchange or board of trade, is not . . . any guarantee that it is ancillary to the legitimate economic efforts of that group. Where a boycott or other restraint is employed by such a group, the law should investigate to determine its relationship to efficiency. (Bork, *op. cit.*, pp. 335-36.)

Nor does Sammi's "government participation" argument establish a comity defense, as this Court made clear in *Hartford Fire Ins. Co. v. State of California* and *Merrett Underwriting Agency Mgmt. Ltd v. State of California* [consolidated cases], 113 S. Ct. 2891, 2910 (1993). (Petition, pp. 12-13.)

B. The Legality Of A Market Division Does Not Depend On Whether The Overall *Quantity* Of Available Product Is Eventually Reduced

Sammi, in its opposing brief, ignores all of the principles discusssed above and focuses its entire argument (Part III of the opposing brief, pp. 9-10) on one incorrect legal assumption: that a market division is not anticompetitive unless and until the arrangement produces a limit on the overall *quantity* of product available. In this case, where Sammi was given a monopoly over the export of stainless steel steamers, that would mean that the arrangement would escape antitrust condemnation until Sammi chose to reduce the quantity of its own product.

This argument echoes a comment by the district court to the effect that competitive harm was "impossible to discern" because Sammi was willing to sell its products to all of the numerous United States customers:

> There is no proof of harm to distributors or to competition in the United States from the temporary steamer blockage. The parties agree that Sammi offered to sell steamers to Vollrath at the same price charged to Ken Carter and numerous unaffiliated importer/distributors and on the same terms. On this state of the record, the harm to American consumers of steamers or the distributors selling those steamers is impossible to discern.

(Petition, App. p. 47a, L.8-15) [*The district court's statement is factually incorrect in certain respects. There was no agreement between the parties that Sammi's price was the same as Dae Lim's. The record is that Vollrath re-*

jected Sammi as a supplier because its price was high and its quality low. (R.T. Vol. 6, p. 36, L.19-p. 37, L.18.) Also, the blockage of the Dae Lim steamer was not "temporary." Sammi stated in February of 1984 that it would block future orders placed by Vollrath, which led Vollrath to abandon the market. (Petition, pp. 8-9.)]

What both Sammi and the district court fail to appreciate is that the elimination of all competition with respect to price and quality is *inherently* damaging to customers, who are deprived of any choice in the marketplace. Under the market division arrangement, all of the many United States customers listed on page 9 of the opposing brief had no choice but to take the Sammi product—at whatever price and in whatever quantities Sammi chose to impose. This was monopoly in its purest form, with an artificial barrier to entry—the "design registration"—that could not be overcome, regardless of the price or quality of the competing product.

It was not necessary to determine if or when Sammi would lower its production or raise its prices after obtaining control of the product. The market division arrangement, itself, is "inherently suspect" and is to be condemned absent any "plausible economic justification." In economic terms, "the evil . . . is not higher prices or smaller production (though those are its concomitants) but misallocated resources, or allocation inefficiency." Bork, *op. cit.*, p. 101.

II. ON QUESTION NO. 2: *THE COURT OF APPEALS' REFUSAL TO DECIDE THE ISSUE*

A. The Issues Presented To The Jury Are Identified By Examining The Facts And The Instructions

This case arises in the context of a JNOV issued by the district court, overturning a jury verdict in favor of Vollrath. The task of the district court in deciding the motion for JNOV, and the task of the court of appeals in reviewing that decision, was to determine whether the verdict

was sustainable in light of the facts presented to the jury by the parties and the instructions given the jury by the district court. The facts in the record concerning the market division are largely uncontroverted (with the exception of a side dispute over whether the exporters' association openly acknowledges that one of its purposes is to avoid "overcompetition" on price), and the instructions were stipulated.

B. The Opposing Brief Ignores Both The Facts And The Instructions

It is impossible to reconcile Sammi's insistence that the market division issue was not presented to the jury with the actual record of the facts and the instructions given to the jury. Following are several examples which leave no doubt that the issue was presented to the jury.

1. Page 2 of the opposing brief refers to the factual recitation by the district court for an "objective statement of the pertinent background." The district court's statement of the facts on the market division begins with the first full paragraph on p. 23a of the Appendix and continues through p. 24a, including notes 10-13. That statement is consistent with the factual statement in the Petition on pp. 4-9.

2. The opposing brief states, on p. 6, that the "gist" of the market division theory was that two of Sammi's subsidiaries *in the United States* participated with Sammi in blocking Korean exports. Nowhere in the record of the case or the district court's Memorandum of Decision is there any mention of the two United States subsidiaries in connection with this issue. It is logically impossible for them to have participated—they were *customers* in the market, not suppliers.

3. The opposing brief's "gist" theory is also belied by the district court's stipulated instructions, which included the non-defendant co-conspirator instructions. These were not applicable to the United States subsidiaries (who were

separate defendants in connection with a subsidized predatory pricing charge involving different products), but they were applicable to Dae Lim, Dae Sung, and other members of the export association. (Pet., pp. 9-10.)

4. On page 3, the opposing brief states that no *per se* theory was presented. That is also belied by the stipulated instructions, which included the appropriate *per se* instruction. (Pet., pp. 9-10.)

5. On page 7, the opposing brief refers to "shreds of evidence" taken from a 17-day trial. The truth, however, is that most of the fact witnesses who appeared testified about this issue. They included four witnesses from Vollrath, one from Metro, one from Montgomery Ward, and two from Sammi.

6. Mr. K. H. Park, a Sammi executive who was Sammi's representative in the export association, was brought from Korea to testify about the "governmental" character of the association and to contradict Vollrath's Ex. 783, the declaration of S.W. Kim, also a Sammi witness. (References to Mr. Park and Mr. Kim occur: in the opposing brief on pages 4-5, including n.5; in the Petition on pp.4-5 and 10; and in the district court Memorandum of Decision, on pp. 23a and 46a of the Appendix). These witnesses could not have been there for any purpose other than this issue.

7. Finally, it is difficult to reconcile Sammi's claim that this charge was not presented to the jury with this statement in the district court's Memorandum of Decision: "[P]laintiff claims that the operation of the Korean Metal Flatware Association itself violated the antitrust laws." (Appendix, p. 46a.)

C. The Decisions Cited In The Opposing Brief Are Not On Point

The opposing brief cites three cases (on pages 7-8) in support of an argument that the court of appeals properly refused to consider the market division issue. In each of

those cases, the issue was whether a litigant could change the ground of a separate *motion* in the appellate court, after the motion had been advanced on another ground and denied in the district court.

The cited cases are not applicable here. In this case, a court of appeals was induced to overlook large portions of a very extensive trial record and to conclude (a) that the market division was presented in the district court as an agreement between Sammi and two United States subsidiaries (which contradicts the entire record) and (b) that *per se* and rule of reason theories must be presented separately (which contradicts basic antitrust principles).

III. ON THE LIMITED RELIEF OPTION: *REMANDING TO THE COURT OF APPEALS WITH INSTRUCTION TO DECIDE THE MARKET DIVISION ISSUE*

The Opposing Brief Does Not Contest The Availability Of The Limited Relief Option

The opposing brief does not contest the availability of the limited relief option. This Court has the authority to remand the case to the court of appeals in order to obtain a decision on this important issue, regardless of whether an "intervening event" has occurred.

CONCLUSION

The opposing brief presents no basis for denying this petition.

Respectfully submitted,

WELDON V. ZUFELT
BENSON, ZUFELT & DONOHUE
630 Riverfront Drive
Sheboygan, WI 53081
(414) 452-6373

MARIO L. HERMAN
5335 Wisconsin Ave., N.W.
Suite 440
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(202) 686-2886

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1101 30th Street, N.W.
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SAMUEL H. SEYMOUR *
1101 30th Street, N.W.
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